Supreme Court, U.S.
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No. 02-424

IN THE

Supreme Court of the United States

PATRICIA SNOWDEN,
Petitioner,

and

KAREN DOWHITE, SHEILA DIANE DOWHITE, LILISTYNE DOWHITE, RENEE WINGO ROBERTS, AND MICHAEL SMITH, SR.,
Plaintiffs,

v.

ELITE FINANCIAL SERVICES, INC. D/B/A CHECKPOINT CHECK CASHING,
Respondent,

and

UNKNOWN OTHER PERSONS AND ENTITIES,
Defendants.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

PIERRE H. BERGERON
DAVID A. PEPPER
SQUIRE, SANDERS & DEMPSEY LLP
312 Walnut Street, Suite 3500
Cincinnati, Ohio 45202
(513) 361-1200

JAMES P. MURPHY
Counsel of Record
JOHN A. BURLINGAME
AMY L. BROWN
SQUIRE, SANDERS & DEMPSEY LLP
1201 Pennsylvania Ave., N.W.
P.O. Box 407
Washington, D.C. 20044
(202) 626-6600

Counsel for Respondent Elite Financial Services, Inc. d/b/a CheckPoint Check Cashing

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit erred by holding that, under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"), and this Court's holding in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), a party cannot avoid arbitration by claiming that the contract containing the arbitration agreement is void *ab initio*.

CORPORATE DISCLOSURE STATEMENT

Elite Financial Services, Inc. d/b/a CheckPoint Check Cashing has no parent company, and no publicly held company owns ten percent or more of Elite Financial Services, Inc.'s stock.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On June 26, 2000, Petitioner Snowden, and Plaintiffs Karen Dowhite, Sheila Diane Dowhite, Lilistyne Dowhite, Renee Wingo Roberts, and Michael Smith, Sr. (collectively "Plaintiffs") filed a purported class action lawsuit in the United States District Court for the District of Maryland

against Elite Financial Services, Inc. d/b/a CheckPoint Check Cashing ("Elite"). Plaintiffs alleged that the deferred deposit check cashing services offered by Elite were loans and that the service fee charged in connection with the deferred deposit transactions constituted usurious interest. Plaintiffs asserted claims against Elite under (1) the federal Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* ("TILA"); (2) MD. CODE ANN., COM. LAW §§12-106 and 12-108; (3) Maryland's Interest and Usury Statutes, MD. CODE ANN., COM. LAW § 12-101 *et seq.*; (4) Maryland's Consumer Loan Law, MD. CODE ANN., COM. LAW § 12-301 *et seq.*; (5) the federal Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO"); (6) the Maryland Consumer Protection Act, MD. CODE ANN., COM. LAW § 13-101 *et seq.*; and (7) common law fraud.

According to Plaintiffs' Complaint, from June 1999 through February 2000, Petitioner conducted twelve deferred deposit check cashing transactions with Elite, including a transaction dated November 4, 1999. As part of her November 4, 1999 transaction, Petitioner entered into a Customer Agreement with Elite, which included an Arbitration Agreement stating as follows:

> 4. *Arbitration Disclosure.* You agree that if a dispute of any kind arises out of this Agreement, any instrument cashed pursuant thereto, or any check or instrument cashed by CheckPoint or fee charged by CheckPoint either prior or subsequent to the date of this Agreement, then either you or CheckPoint or third-parties involved can choose to have that dispute resolved by binding arbitration as set forth in Paragraph 5 below. If arbitration is chosen, it will be conducted with the American Arbitration Association (the "AAA") pursuant to the AAA's Commercial Arbitration Rules.
>
> 5. *Arbitration Provision.* Any claim, dispute or controversy (whether in contract, tort, or otherwise, whether

pre-existing, present or future, and including statutory, common law, intentional tort, and equitable claims) arising from or relating to this Agreement or any check or instrument cashed by CheckPoint or fee charged by CheckPoint either prior or subsequent to the date of this Agreement, or advertisements, promotions, or oral or written statements relating to this Agreement or the relationships that result from this Agreement (including, to the full extent permitted by applicable law, relationships with third-parties who are not signatories to this Agreement or this Arbitration Provision) or the validity, enforceability, or scope of this Arbitration Provision or the entire Agreement (collectively "Claim"), shall be resolved, upon the election of you or CheckPoint or said third-parties, by binding arbitration pursuant to this Arbitration Provision and the Commercial Arbitration Rules in effect at the time the Claim is filed. A party who has asserted a claim in a lawsuit in court may elect arbitration with respect to any claim(s) subsequently asserted in that lawsuit by any other party or parties. THERE SHALL BE NO AUTHORITY FOR ANY CLAIMS TO BE ARBITRATED ON A CLASS ACTION BASIS. FURTHER, AN ARBITRATION CAN ONLY DECIDE CHECKPOINTS OR YOUR CLAIM AND MAY NOT CONSOLIDATE OR JOIN THE CLAIMS OF OTHER PERSONS WHO HAVE SIMILAR CLAIMS. Any participatory arbitration hearing that you attend will take place in the federal judicial district of your residence. At your written request, we will advance the first $50 of the filing and hearing fees for any claim which you may file against us. The arbitrator will decide whether we or you will ultimately be responsible for paying any fees in connection with the arbitration. Unless inconsistent with the applicable law, each party shall bear the expense of their respective attorneys', experts' and witness fees, regardless of which party prevails in the arbitration.

> This arbitration agreement is made pursuant to a transaction involving interstate commence [sic], and shall be governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. Sections 1-16. The arbitrator shall apply applicable substantive law consistent with the FAA and applicable statutes of limitations and shall honor claims of privilege recognized by law. Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction. The Arbitration Provision shall survive satisfaction of your contractual obligations and termination of this Agreement. If any portion of this Arbitration Provision is deemed invalid or unenforceable under the FAA, should not invalidate the remaining portions of this Arbitration Provision.

Customer Agreement dated November 4, 1999 (JA 54).

Pursuant to this Arbitration Agreement, Elite moved the district court to compel Petitioner's claims against it to arbitration. The district court denied this motion without prejudice, whereupon Elite appealed to the Fourth Circuit. The Fourth Circuit reversed. Relying on this Court's decision in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), the Fourth Circuit concluded that because Petitioner's challenges to arbitration do not relate specifically to the Arbitration Agreement, nor do they underlie a claim that Petitioner failed to assent to the terms of the November 4, 1999 Agreement, her challenges must be resolved by the arbitrator, rather than the court. The Fourth Circuit, accordingly, vacated the district court's order denying Elite's motion to compel arbitration and remanded with instructions to grant the motion.

REASONS FOR DENYING THE PETITION

Petitioner has failed to provide the Court with a basis to grant certiorari in this case. First, contrary to Petitioner's arguments, there is no "deep split" of authority on whether

arbitration can be compelled when the underlying contract containing the arbitration agreement is alleged to be void *ab initio*. Lower courts have faithfully adhered to this Court's holding in *Prima Paint* and have compelled arbitration where the challenge to arbitration goes not to the making or performance of the arbitration agreement but to the making or performance of the underlying contract. Every federal appellate court to address this issue has consistently applied this Court's ruling in *Prima Paint*, while the state supreme court cases relied upon by the Petitioner are inapposite or a misapplication of the law. Thus, notwithstanding Petitioner's efforts to manufacture a split of authority, no such split exists.

Moreover, Petitioner's claim that the decision below conflicts with this Court's precedent interpreting and applying the FAA is wholly without merit and provides no basis for granting certiorari. The Fourth Circuit's decision below is consistent with this Court's long-standing and well-settled federal policy regarding arbitration.

I. NO "DEEP SPLIT" OF AUTHORITY EXISTS.

Petitioner incorrectly contends that there is lower court disagreement over the central issue raised in this case. While Petitioner obscures the fact that every federal appellate court to consider this precise issue has reached the same conclusion, she points to three state supreme court decisions and claims that a "deep split" exists. However, closer inspection of these authorities reveals that only one of the cases can be characterized as in conflict with the weight of federal authority, and this outlier case does not provide sufficient grounds for certiorari. This is especially so given recent developments in this area of the law, in which courts, federal and state alike, have consistently rejected the proposition of law advocated by Petitioner.

A. Federal Authority Recognizes That Challenges to the Contract Based on Illegality Must Be Considered by the Arbitrator Rather Than a Court.

The opinion below is the latest of a trio of recent federal appellate decisions that have held, unanimously, that claims that an entire contract is void *ab initio* as a result of a violation of state law present a question for an arbitrator, rather than a court. *See Burden v. Check Into Cash of Ky., LLC*, 267 F.3d 483 (6th Cir. 2001), *cert. denied*, 122 S. Ct. 1436 (2002); *Bess v. Check Express*, 294 F.3d 1298 (11th Cir. 2002). *Burden* involved the unremarkable application of *Prima Paint*, 388 U.S. at 404, in which this Court limited a court's discretion in deciding whether to enforce an arbitration provision to "consider[ing] only issues relating to the making and performance of the agreement to arbitrate," rather than including issues relating to the making or performance of the entire contract in which it appears. While the plaintiffs in *Burden* sought to avoid *Prima Paint's* severability doctrine by claiming that the underlying contracts were void, the Sixth Circuit aptly recognized that the authorities upon which they relied involved "questions of signatory power, not contract content." *Burden*, 267 F.3d at 489. The court consequently explained that the *Prima Paint* rule would not apply if the plaintiffs produced evidence that they did not actually sign, or lacked signatory power to ratify, the agreements at issue. When the challenge to arbitrability did not involve such a question of signatory power, however, any attack on the contract as a whole (including based on allegations of illegality) had to be decided by the arbitrator, consistent with *Prima Paint*. *See id.* at 490.

Both *Bess* and the Fourth Circuit's opinion in this matter embraced *Burden*. *Bess*, like *Burden*, involved an attack on an arbitration clause contained in a deferred deposit check cashing transaction. The plaintiff sought to avoid arbitration

by claiming that the underlying contracts violated state law, but the Eleventh Circuit recognized that the plaintiff "challenges the *content* of the contracts, not their *existence*." *Bess*, 294 F.3d at 1305 (emphasis in original). Under *Prima Paint*, a claim that a contract is void *ab initio* "is an issue for the arbitrator," rather than the court. *Id.* at 1306. Moreover, after surveying precedent on this issue, the Eleventh Cir cuit noted that "[w]e are aware of only one other circuit to address the question presented in this case . . . and that circuit reached the same conclusion that we reach today." *Id.* (citing *Burden*).

The decision of the Fourth Circuit below reached the same results as the Sixth and Eleventh Circuits: "We note that our conclusion is squarely in accord with the Sixth Circuit's recent and well-reasoned decision in *Burden* . . ." (Pet. App. 10). The unanimous Fourth Circuit explained, consistent with the Eleventh and Sixth Circuits, that *Prima Paint's* severability rule does not apply "when the party seeking to avoid arbitration contends that it never assented in the first place to the contract containing the arbitration provision," but that challenges based on the perceived illegality of the underlying contract attack the contract as a whole rather than the arbitration clause. As such, these issues must be directed to the arbitrator.

The results in these cases comprise a consistent reading and application of *Prima Paint*, and comport with existing federal authority. *See, e.g., Large v. Conseco Finance Servicing Corp.*, 292 F.3d 49, 53 (1st Cir. 2002) ("[Plaintiffs] do not allege that [defendant] engaged in illegal conduct with respect to the arbitration clause itself."); *Primerica Life Ins. Co. v. Brown*, __ F.3d __, __ n.2 (5th Cir. 2002), 2002 U.S. App. LEXIS 17836, at *6 n.2 (5th Cir. Aug. 28, 2002) (finding that the district court erroneously held that *Prima Paint* did not apply "to defenses which render a contract void"); *Lawrence v. Comprehensive Business Servs. Co.*, 833 F.2d 1159, 1162 (5th Cir. 1987) ("Because the Lawrences do not attack the

arbitration agreement itself, *Prima Paint* requires that their claim of illegality be arbitrated pursuant to the contract."); *National R.R. Passenger Corp. v. Consolidated Rail*, 892 F.2d 1066, 1070 (D.C. Cir. 1990) (holding that the district court "erred in treating the arbitration clause as unenforceable merely because the substantive contract provision in dispute between the parties may—if the district court is correct about public policy—be unenforceable"); *Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress Int'l, Ltd.*, 1 F.3d 639, 642 (7th Cir. 1993). These cases demonstrate that, contrary to Petitioner's suggestion, the federal courts have reached a consensus on the scope and applicability of the FAA pursuant to *Prima Paint*.

In the face of this clear case law, Petitioner suggests that there is a split among federal courts by citing the Third Circuit's decision in *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99 (3d Cir. 2000). The quotations to *Sandvik* in the certiorari petition are taken out of context. (Pet. 14-15). *Sandvik* involved a situation in which one party claimed that it had not assented to the contract from the outset: "Advent contends that the agent who signed the agreement on its behalf lacked authority to do so and that it had so notified Sandvik . . ." *Id.* at 100. In other words, *Sandvik* is a perfect illustration of the cases that *Burden* described as involving "questions of signatory power, not contract content." *Burden*, 267 F.3d at 489. Because *Sandvik* involved questions of signatory power rather than contract content, the Third Circuit affirmed the denial of the motion to compel arbitration and confirmed the common understanding of *Prima Paint* detailed above. As a result, rather than conflicting with the Fourth, Sixth, and Eleventh Circuits, the Third Circuit's decision in *Sandvik* comports with those decisions.[1]

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[1] Indeed, all three decisions specifically cite *Sandvik*. *See, e.g., Burden*, 267 F.3d at 489; *Bess*, 294 F.3d at 1306; Pet. App. at 10.

In endorsing the severability rule in *Prima Paint*, this Court honored "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint*, 388 U.S. at 404. The rule advocated by Petitioner—and rejected by federal courts—would oblige courts to decide dispositive issues, which would vitiate the benefits of arbitration and contravene the purposes of the FAA For that reason, courts have consistently applied the *Prima Paint* rule to challenges to the underlying contract, unless one party presents substantial evidence that it never entered into the contract at issue.

B. Petitioner Misconstrues State Authority.

Faced with unanimity on the federal side, Petitioner seeks to manufacture a split by pointing to three state court opinions. *See Pittsfield Waving Co., Inc. v. Grove Textiles, Inc.*, 430 A.2d 638 (N.H. 1981); *Alabama Catalog Sales v. Harris*, 794 So. 2d 312 (Ala. 2000); *Nature's 10 Jewelers v. Gunderson*, 648 N.W.2d 804 (S.D. 2002). Two of these cases, however, are inapposite, and the remaining decision simply involves "the misapplication of a properly stated rule of law." S. Ct. R. 10.

The decision in *Pittsfield* addressed the issue of unconscionability—not the question of whether allegations of a void *ab initio* contract must be heard by the arbitrator or judge. As such, the opinion does not conflict with the federal authority delineated above. *Pittsfield* has been cited by courts only a handful of times since its issuance, and no court has interpreted it to mean that a challenge to the legality of the underlying contracts exempts the agreement from *Prima Paint*. Petitioner's reliance on *Pittsfield* as contrary authority is, therefore, misplaced.

Similarly, while the result in *Nature's 10* may at first glance appear inconsistent with federal authority, the majority

opinion does not make clear that it is applying the FAA. Indeed, the majority opinion in *Nature's 10* does not cite the FAA, and it relies exclusively on state law and authority from other state courts. While the court's interpretation of state law may be questionable, such matters are not of concern to this Court.

That leaves *Alabama Catalog Sales* as the lone outlier. The Alabama court handed down its divided *Alabama Catalog Sales* before the recent federal cases were decided, and thus did not have the benefit of these opinions.[2] Moreover, the court gave an unduly restrictive reading to *Prima Paint*: "this Court reads *Prima Paint* narrowly." *Alabama Catalog Sales*, 794 So. 2d at 315 n.2. At bottom, the majority in *Alabama Catalog Sales* premised its opinion on a misreading of *Three Valleys Municipal Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136 (9th Cir. 1991). Like the plaintiffs in *Burden*, the majority read *Three Valleys* to preclude arbitration as long as a question was raised as to the existence of the underlying contract. As *Burden, Bess*, and the decision below explain, however, *Three Valleys* and cases of similar ilk do not stand for the broad proposition that any challenge to the validity of a contract secures a judicial forum. Rather, they emphasize that only when the case involves "questions of signatory power," *Burden*, 267 F.3d at 489, or "questions of assent to the general contract," *Bess*, 294 F.3d at 1306, or an allegation that the party "never assented in the first place to the contract containing the arbitration provision" (Pet. App. 9) does the trial court intervene. Not surprisingly, in the two years since *Alabama Catalog Sales'* issuance, no state court outside of Alabama

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[2] It should also be noted that Alabama courts have taken a particularly hostile view toward deferred deposit check cashing transactions, even concluding that they do not affect interstate commerce (and thus do not trigger the FAA). *See, e.g., Alternative Fin. Solutions, LLC v. Colburn*, 821 So. 2d 981 (Ala. 2001).

has even cited the decision, and the only two federal courts to consider it have refused to follow its lead. *See Bess*, 294 F.3d at 1306 n.3; *Arnold v. Goldstar Fin. Sys., Inc.*, 2002 U.S. Dist. LEXIS 15564, at *27 (N.D. Ill. Aug. 20, 2002).

If circuit splits develop in this area, or if state courts ignore their federal counterparts,[3] then this issue may certainly become worthy of the Court's attention. At this juncture, however, the divided Alabama decision that predates three unanimous federal circuit opinions does not warrant certiorari. While it is arguable that courts had not settled on the proper scope of *Prima Paint* at the writing of *Alabama Catalog Sales*, those doubts have been laid to rest by the series of clear and consistent federal opinions on this matter. And, to date, no court has rejected the approach embraced by the Fourth, Sixth, and Eleventh Circuits. There simply is no "split" to speak of, and no basis to Petitioner's argument that certiorari is warranted on this ground.

II. THE FOURTH CIRCUIT'S DECISION COMPORTS WITH THIS COURT'S PRECEDENT.

Petitioner's argument that the Fourth Circuit's decision contravenes Supreme Court precedent is also unavailing. Indeed, the Fourth Circuit's reasoning adheres precisely to this Court's precedent interpreting and applying the FAA. Rather than addressing the applicability of *Prima Paint*, Petitioner maintains that the Fourth Circuit decision conflicts with several other Supreme Court decisions. In fact, the cases Petitioner cites are wholly inapposite to the issue addressed below, providing no binding precedent. More generally, the

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[3] Recent state cases demonstrate adherence to the trio of federal circuit court decisions rather than the state cases cited by Petitioner. *See, e.g.*, *Buckeye Check Cashing, Inc. v. Cardegna*, 2002 Fla. App. LEXIS 10336, at *7-*9 (Fla. Ct. App. July 24, 2002) (citing and following *Bess*).

proposition for which these cases stand—that courts are to treat arbitration agreements in the same fashion as any other contract—is advanced by the decision below.

Relying principally upon this Court's decision in *Prima Paint*, the Fourth Circuit concluded that because Petitioner's allegations of usurious rates of interest do not relate to the arbitration agreement, and because her allegations do not underlie a claim that Petitioner failed to assent to the terms of the underlying agreement in the first place, those allegations must be resolved through arbitration. This approach is a straightforward and faithful application of *Prima Paint*, where this Court squarely held that, in considering a motion for a stay to allow for arbitration, the "court may consider *only* issues relating to the making and performance of the *agreement to arbitrate*," and *not* issues relating to the making of the contract generally or its enforceability. 388 U.S. at 404 (emphasis added). The *Prima Paint* decision, of course, follows logically from the text of the FAA, which states that "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. § 4. As explained *supra*, the decision also comports with the settled approach of federal appellate courts on this question.

Rather than addressing *Prima Paint*, Petitioner points to several other Supreme Court cases applying the FAA to argue that the Fourth Circuit's decision conflicts with Court precedent. In particular, she cites *Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 122 S. Ct. 754 (2002), *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), and *Allied-Bruce Terminix Co., Inc. v. Dobson*, 513 U.S. 265 (1995), for the general proposition that arbitration clauses

should be treated "on the same footing" as other contracts. (Pet. 17-18). These cases have no bearing on the precise issue that was before the Fourth Circuit.

First, *Waffle House* involved a question of whether the FAA required the EEOC to arbitrate a discrimination action when the employee involved signed an arbitration clause. The Court held that it did not because the statute authorizing the EEOC granted it exclusive authority over the choice of forum and prayer for relief once it brings a charge. *See* 122 S. Ct. at 766. Further, the Court explained that the FAA "does not purport to place any restriction on a *nonparty's* choice of a judicial forum." *Id.* at 762 (emphasis added). This Court's decision in *Waffle House* has no bearing here. Unlike the EEOC, Petitioner is a party to the Arbitration Agreement. Indeed, she does not dispute that signed the Consumer Agreement containing the Arbitration Provision.

Second, *Doctor's Associates* concluded that a Montana state law requirement that singularly limited the validity of arbitration agreements was preempted by the FAA. *See* 517 U.S. 681, 688 (1996). While not directly apposite to the issues in this case, the *Doctor's Associates* decision underscores the unencumbered enforcement of valid arbitration clauses—just as the Fourth Circuit has done in this case. And *Allied-Bruce Terminix* addressed the scope of Section 2 of the FAA, which states that its mandate only applies to a "contract evidencing a transaction involving commerce." 9 U.S.C. § 2. The Court held that this phrase should be read broadly, "extending the Act's reach to the limits" of the Commerce Clause power. 513 U.S. at 268. Again, while making clear the breadth of the FAA, this holding does not address the issue before this Court, which falls squarely under the *Prima Paint* doctrine.

In sum, the Fourth Circuit's decision in no way conflicts with the three cases Petitioner cites. As Petitioner herself acknowledges, the common principle articulated in all three

cases is that arbitration clauses stand on the same footing as other contractual provisions, and must be treated as such by courts. The decision below in fact buttresses that principle by disallowing Petitioner from circumventing a valid and enforceable arbitration agreement. In doing so, the decision comports with *Prima Paint*, and advances the Court's consistent and long-standing approach to the FAA.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

PIERRE H. BERGERON
DAVID A. PEPPER
SQUIRE, SANDERS & DEMPSEY LLP
312 Walnut Street, Suite 3500
Cincinnati, Ohio 45202
(513) 361-1200

JAMES P. MURPHY
Counsel of Record
JOHN A. BURLINGAME
AMY L. BROWN
SQUIRE, SANDERS & DEMPSEY LLP
1201 Pennsylvania Ave., N.W.
P.O. Box 407
Washington, D.C. 20044
(202) 626-6600

Counsel for Respondent Elite Financial Services, Inc. d/b/a CheckPoint Check Cashing